U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: DEC 22 2008

EAC 06 109 50416

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a textile and apparel business. It seeks to employ the beneficiary permanently in the United States as a carpet repairer. As required by statute, the petition is accompanied by a Form ETA 9089, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's November 15, 2006 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 9089, Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 9089, Application for Alien Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 9089 was accepted on August 4, 2005. The proffered wage as stated on the Form ETA 9089 is $17.95 per hour which equates to $37,336.00 per year for 40 hours per week. The Form ETA 9089 states that the position requires 24 months of experience.

[redacted]ns plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1] Counsel submits a statement on appeal. Other relevant evidence in the record includes the sole proprietor's individual federal tax returns for 2005, 2006 and 2007. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship. On the petition, the petitioner stated it was established in 1986. The petitioner stated that it currently employs two workers. On the Form ETA 9089, the beneficiary claimed to work for the petitioner from July 1, 2004 to December 31, 2005.

On appeal, counsel states that the petitioner has sufficient funds to pay the beneficiary's prevailing wage. Counsel asserts that the petitioner's inventory totaling $136,800.00 at the end of 2006 should be considered an asset, and the petitioner's gross sales and profits for 2006 and 2007 demonstrate the ongoing viability of the company.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage of $37,336.00 in 2005.[2]

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than $20,000 where the beneficiary's proposed salary was $6,000 or approximately thirty percent (30%) of the petitioner's gross income.

The record before the director closed on August 14, 2006 with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. As of that date, the petitioner's 2006 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2005 is the most recent return available.

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[2] The record includes copies of IRS Forms W-2 showing wages paid to the beneficiary for 2004. As previously noted, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date which in this case is August 4, 2005. The AAO observes that the record does not include an IRS W-2 Form showing wages paid to the beneficiary for 2005.

In the instant case, the sole proprietor supports himself, a spouse, and two dependents. The tax returns reflect the following information for 2005:

Proprietor's adjusted gross income (Form 1040)	$42,717.00
Petitioner's gross receipts or sales (Schedule C)	$503,751.00
Petitioner's wages paid (Schedule C)	$21,400.00
Petitioner's net profit from business (Schedule C)	$53,383.00

The tax returns reflect the following information for 2006:

Proprietor's adjusted gross income (Form 1040)	$27,720.00
Petitioner's gross receipts or sales (Schedule C)	$418,045.00
Petitioner's wages paid (Schedule C)	$7,700.00
Petitioner's net profit from business (Schedule C)	$37,523.00

The tax returns reflect the following information for 2007:

Proprietor's adjusted gross income (Form 1040)	$73,676.00
Petitioner's gross receipts or sales (Schedule C)	$302,018.00
Petitioner's wages paid (Schedule C)	$0
Petitioner's net profit from business (Schedule C)	$48,144.00

In 2005, the sole proprietorship's adjusted gross income of $42,717.00 covers the proffered wage of $37,336.00. At that time, the sole proprietor supported a family of four. The AAO notes that the sole proprietor's household expenses for 2005 total $46,560.00. It is improbable that the sole proprietor could support himself and his family on $5,381.00 for an entire year, which is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. In 2006, the sole proprietorship's adjusted gross income of $27,720.00 does not cover the proffered wage of $37,336.00. In 2007, the sole proprietorship's adjusted gross income of $73,676.00 covers the proffered wage of $37,336.00. The amount of $36,340.00 is what remains after reducing the adjusted gross income by the amount required to pay the proffered wage. While the record does not include a statement of the sole proprietor's household expenses for 2007, the AAO notes that in 2007 the sole proprietor supported a family of five. As the sole proprietor's household expenses for 2005 total $46,560.00 and the sole proprietor's family increased by one in 2007, it is improbable that the sole proprietor could support himself and his family on $36,340.00 for the entire year.

Counsel asserts that the petitioner's inventory totaling $136,800.00 at the end of 2006 should be considered an asset,[3] and the petitioner's gross sales and profits for 2006 and 2007 demonstrate the ongoing viability of the company. As previously stated, the petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date which in this case is

[3] If the petitioner were to sell or otherwise encumber its inventory, it is unclear to USCIS how the petitioner's business could continue to operate.

August 4, 2005. As the record closed on August 14, 2006, the petitioner must show it has the ability to pay for 2005.

Beyond the director's decision, the petition was improperly filed as neither the employer, alien, attorney and/or agent signed the original certified ETA Form 9089 and should have been rejected by USCIS according to 20 C.F.R. § 656.17(a)(1). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 299 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.